80-1017

Supreme Court, U. S.
FILED
DEC 19 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. _____

EMMANUEL LOUCAS, PETITIONER,

V.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

EMMANUEL LOUCAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Emmanuel Loucas, of Weirton, West Virginia, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit previously entered in this case.

QUESTIONS PRESENTED FOR REVIEW

(1) Whether one can be convicted of aiding and abetting under the Travel Act,

18 U.S.C. § 1952(a)(3), without knowledge that the principal has travelled in interstate commerce.

(2) Whether proof of an actual violation of the underlying state statute named in a Travel Act indictment is a necessary element for conviction under the Act, 18 U. S. C. § 1952(a)(3).

(3) Whether "implied bias" is a sufficien reason for striking jurors for cause upon an appropriate and timely defense motion without a showing of actual bias.

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 629 F.2d 989 (4th Cir. 1980) and appears in the Appendix hereto at pp. 1a - 11a.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on September 26,

1980. A timely petition for rehearing and suggestion for rehearing in banc was denied on October 27, 1980, and this petition for certiorari was filed within 60 days of the last-mentioned date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutory provisions involved in this case are as follows:

(1) the federal aiding and abetting statute, 18 U.S.C. §2;

(2) the federal statute prohibiting interstate travel in aid of racketeering enterprises commonly known as the "Travel Act," 18 U.S.C. §1952(a)(3);

and

(3) the West Virginia statute relating to keeping or exhibiting gaming devices, West Virginia Code, §61-10-1.

The aforesaid statutes are set out verbatim in the Appendix hereto at pp. 22a - 26a.

STATEMENT OF THE CASE

On April 5, 1979, the petitioner, Emmanuel Loucas, was indicted in the United States District Court for the Northern District of West Virginia for conspiracy to violate a gambling statute and a bribery statute of the State of West Virginia and for aiding and abetting another to travel in interstate commerce for the purpose of promoting activities alleged to violate four different gambling statutes of the State of West Virginia.[1] Both the conspiracy count and the aiding and abetting count related to alleged violations of the Travel Act, 18 U.S.C. §1952(a)(3).

After a first-trial hung jury, Loucas was acquitted in a second trial on October 18, 1979, on the conspiracy charge and was convicted on the aiding and abetting count. On January 22, 1980, the District Court

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[1]The aiding and abetting count is set forth verbatim in the Appendix at p. 27a.

sentenced Loucas to serve two years in the custody of the Attorney General and five years of supervised probation and to pay a fine of $5,000.00. (App. 12a-15a). Thereafter, on February 13, 1980, the District Court reduced the confinement portion of the sentence from two years to six months. (App. 16a-17a).

Loucas filed a timely appeal of his conviction in the United States Court of Appeals for the Fourth Circuit. On September 26, 1980, the Fourth Circuit affirmed the conviction. (App. 18a).

With respect to Loucas' first question for review presented in this petition, the Fourth Circuit overlooked the issue or at least did not specifically address the knowledge question in its opinion. (App. 1a-11a). Therefore, Loucas filed a timely petition for rehearing and also requested a hearing in banc because the Fourth Circuit and the Sixth Circuit are in direct conflict on whether knowledge by the aider and

abetter of his principal's interstate travel is a necessary element for convicting the aider and abetter under 18 U.S.C. §1952(a)(3).[2] Nevertheless, the Fourth Circuit denied the petition for rehearing on October 27 1980. (App. 21a).

With respect to the other two questions presented for review in this petition, the Fourth Circuit held that proof of an actual violation of the underlying state statute named in a Travel Act indictment is not a necessary element for a conviction under the Act , 18 U.S.C. §1952(a)(3), and that a showing of "implied bias" is not a sufficient reason to strike jurors for cause. (App. 7a-8a, 10a).

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[2]The Fourth Circuit has held in United States v. LeFaivre, 507 F. 2d 1288 (4th Cir. 1974), cert. denied, 420 U.S. 1004 (1975), that in a Travel Act case, knowledge by the aider and abetter that his principal has travelled in interstate commerce is not necessary in order to convict the aider and abetter for violating the Travel Act. However, the Sixth Circuit, in a more recent case, United States v. Prince, 529 F. 2d 1108, 1112 (6th Cir. 1976), cert. denied, 429 U.S. 838 (1976), has taken a completely contrary view.

ARGUMENT

I.

Fourth Circuit and Sixth Circuit Conflict on Whether One Can Be Convicted of Aiding and Abetting Under the Travel Act Without Knowledge that the Principal Travelled in Interstate Commerce.

In upholding Loucas' conviction, the Fourth Circuit, in essence, reaffirmed its holding in United States v. LeFaivre, supra note 2, that one can be convicted of aiding and abetting under the Travel Act, 18 U.S.C. §1952(a)(3), even though the aider and abetter had no knowledge that the principal has travelled in interstate commerce. This holding directly conflicts with the view in the Sixth Circuit as expressed in United States v. Prince, supra note 2, where the court stated as follows:

> "An aiding and abetting charge requires proof of a 'specific intent to facilitate the commission of a crime by another.' United States v. Bryant, 461 F.2d 912, 920 (6th Cir. 1972). In the absence of proof that (the defendant) had knowledge of

> (the principal's) violations of the Travel Act, (the defendant) cannot be held for aiding and abetting (the principal) in the violation thereof."

Admittedly, the Fourth Circuit's view is shared by a majority of circuits which have considered the question;[3] nevertheless, this petition for writ of certiorari should be allowed in order to resolve this conflict. Where, as here, circuits are divided over what constitutes an essential element of a federal criminal statute, this Court should resolve that conflict so that the federal criminal laws are applied uniformly in all circuits.

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[3] See for example United States v. Peskin, 527 F.2d 71, 78 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976); United States v. Sellaro, 514 F.2d 114, 120-121 (8th Cir. 1973), cert. denied, 421 U.S. 1013 (1975); and United States v. Villano, 529 F.2d 1046, 1054 (10th Cir. 1976), cert. denied, 426 U.S. 953 (1976).

II.

Fourth Circuit's Ruling That Proof of An Actual Violation of the Underlying State Statute in a Travel Act Indictment is Not a Necessary Element Distorts the Plain and Literal Meaning of the Act

By holding that proof of the underlying state violation (in this case, West Virginia Code, §61-10-1, prohibiting the keeping or exhibiting of gaming devices) is not a necessary element in a Travel Act conviction, the Fourth Circuit is ignoring the plain and literal wording of 18 U.S.C. §1952 (a)(3) and is saying that one can violate the Travel Act even without evidence that a state law has been violated. The operative words of §1952(a)(3) are as follows:

> "Whoever travels in interstate commerce... with intent to- promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity... shall be (guilty of an offense)."

Summarized fairly, this statute makes it a

federal offense to cross state lines for the purpose of conducting an unlawful activity. However, the Fourth Circuit, citing its earlier holding in United States v. Pomponio, 511 F. 2d 953, 957 (4th Cir. 1975), cert. denied, 423 U.S. 874 (1975), rehearing denied, 423 U.S. 991 (1975), and the Eighth Circuit case of McIntosh v. United States, 385 F.2d 274, 277 (8th Cir. 1967), would rewrite the statute by injecting the words "could have" so as to broaden the statute to include anyone who travels in interstate commerce and either conducts an unlawful activity or "could have" conducted an unlawful activity. The emphasis on the words "could have" as used in United States v. Hiatt, 527 F.2d 1048, 1051 (9th Cir. 1976), is misplaced. At page 1050 of the Hiatt case, the court said,

> "The third argument advanced by appellant is that to be found guilty of a violation of the Travel Act, there must be a finding that the underlying activity was in violation of state law."

After further explaining the argument, the

court then said at page 1051,

> "It is correct that the existence of a state law violation is an element of the violation of the Travel Act and that the court must make a determination of whether the underlying state law has been or could have been violated. United States v. Kahn, 472 F. 2d 272, 277 (2d Cir.), cert. denied, 411 U.S. 982, 93 S.Ct. 2270, 36 L. Ed.2d 958 (1973); see United States v. Nardello, 393 U.S. 286, 89 S. Ct. 534, 21 L. Ed. 2d 487 (1969)."

Why the Hiatt court used the words "could have" is a mystery. The cases cited after those words, Kahn and Nardello, do not even mention "could have." Thus, it would appear that the Hiatt court used the words unwittingly or without special significance. Nevertheless, the Fourth Circuit has given them emphasis. (App. 7a).

It is fundamental and basic law that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed. Where that language is plain and unambiguous, the courts are not free to add words which change or extend its

intended application. Caminetti v. United States, 242 U.S. 470, 485 (1916). Thus, this writ should be allowed in order to clarify what appears to be the obvious meaning of 18 U.S.C. §1952(a)(3).

III.

The Failure to Recognize "Implied Bias" of Jurors Precludes a Defendant From Being Tried By a Fair and Impartial Jury.

The Fourth Circuit's refusal to recognize the "implied bias" theory as a sufficient reason to excuse jurors for cause is a substantial denial of the right to be tried by a fair and impartial jury and is another reason for allowing this writ.

At the time of Loucas' trial, he was one of 25 or 26 individuals arrested for gambling and racketeering violations resulting from a combined undercover investigation conducted by the Federal Bureau of Investigation, West Virginia State Police and the Sheriff of Hancock County, West Virginia. Included among

those accused were the Prosecuting Attorney of Hancock County, two other lawyers (one of which was the petitioner Loucas) and at least two alleged members of "organized crime." From the date of the first of several indictments on February 6, 1979, to the start of Loucas' trial on October 15, 1979, the counties of West Virginia from which the jurors were drawn were literally deluged with television, radio and newspaper publicity concerning these similar and related cases.

By the time of Loucas' second trial, most of the other indictments had already been tried. In all of the previous trials, the government's main witness was the Hancock County Sheriff, who pretended to be a corrupt sheriff on the take and testified concerning his undercover activities. On July 25, 1979, less than three months before Loucas' retrial, the trial of Constantine "Gus" Karas concluded resulting in a guilty verdict. Consistent with the government's pattern of proof throughout the several gambling trials, the sheriff

was the leading government witness. Also, the two government prosecutors were the same two Assistant United States Attorneys assigned to try the Loucas case.

Four of the panel of 28 jurors chosen for the Loucas trial had served as trial jurors in the Karas case. Since those jurors recently sat on a similar "gambling and racketeering" trial, had the opportunity to hear the testimony of the sheriff and possibly other identical witnesses and had the opportunity to observe the same two government prosecutors, the defense moved to strike those jurors for cause. The denial of this motion forced the defense to use four of its peremptory challenges to strike these jurors.

Although United States v. Stevens, 444 F.2d 630, 632 (6th Cir. 1971), and the dissent in Casias v. United States, 315 F.2d 614, 620 (10th Cir. 1963), cert. denied, 374 U.S. 845 (1963), support the implied bias rule, the Fourth Circuit chose to follow the more traditional view that a showing of actual

partiality is required before a juror need be discharged for cause. However, the actual bias requirement places a nearly impossible burden on a defendant especially where jurors are too timid or unwilling to reveal their actual prejudices in response to voir dire. By allowing this writ, this Court can rectify a substantial denial of the right of fair trial.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully Submitted,

JAMES F. COMPANION
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Attorney for Petitioner

December 19, 1980.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 80-5010

UNITED STATES OF AMERICA,

Appellee,

v.

EMMANUEL "MANNY" LOUCAS,

Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. Robert E. Maxwell, Chief District Judge.

Argued: August 15, 1980

Decided: September 26, 1980

Before FIELD, Senior Circuit Judge; HALL and SPROUSE, Circuit Judges.

James F. Companion (Schrader, Stamp & Recht; John R. Mitchell on brief) for Appellant; William A. Kolibash, Assistant United States Attorney (Stephen G. Jory, United States Attorney on brief) for Appellee.

HALL, Circuit Judge:

Emmanuel "Manny" Loucas, a West Virginia attorney, appeals from his conviction under the Travel Act, 18 U.S.C. §1952(a), for aiding and abetting Silvio "Birdie" Pinciaro, an Ohio resident and client who had travelled in interstate commerce for the purpose of promoting various illegal gambling activities in Hancock County, West Virginia. Pinciaro, Loucas, and Richard Tingler[1/] were named in a superseding, six-count indictment which was returned by a federal grand jury on April 5, 1979. The indictment charged Pinciaro with six violations of the Travel Act for various transactions involving bribery and gambling. Loucas was named in two counts of the indictment: Count I alleged his participation in a conspiracy involving interstate commerce to commit bribery and to promote illegal gambling

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[1/]No further reference will be made regarding defendant Tingler since his role in the illegal conduct is not material to the issues raised in this appeal.

activities; Count VI alleged that he aided and abetted Pinciaro in promoting various gambling enterprises which also involved interstate travel.

Pinciaro and Loucas were tried jointly before a jury in May 1979. The jury found Pinciaro guilty on all six counts but could not reach a verdict as to Loucas. A mistrial was declared and Loucas was again tried in October 1979. His retrial resulted in a judgment of acquittal as to Count I and a guilty verdict for Count VI. Loucas received a sentence of five years' imprisonment, which was ultimately reduced to six months, five years of supervised probation, and a fine of $5,000. After the district court denied his post-trial motions, Loucas appealed on the basis of numerous assignments of error. Finding no reversible error, we affirm his conviction.

Although Loucas raises several issues on appeal, only two merit discussion: (1) whether the evidence was sufficient to sustain

the conviction, and (2) whether the disctict court erred by not striking four jurors for cause. Appellant's initial assignment of error is that the evidence was insufficient to sustain his conviction. Although the adequacy of the evidence is challenged on several grounds, counsel's main argument is that no evidence was presented at trial to show that the retrieval of certain slot machines seized in a raid at Pinciaro's place of business was connected to any illegal gambling activity.

Count VI of the indictment alleged violations of four state statutes dealing with illegal gambling activities.[2/] Of these four, counsel asserts that the prosecution only produced evidence connecting Loucas to aiding and abetting Pinciaro in a possible violation

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[2/]The statutes under which Loucas was charged with aiding and abetting Pinciaro were West Virginia Code §61-10-1 (keeping or exhibiting a gaming machine or device), §61-10-5 (betting on games of chance), §61-10-11 (conducting lotteries or raffles), and §61-10-11a (conducting "policy" or "numbers" operations).

of West Virginia Code §61-10-1, illegal possession of gambling machines. This evidence consisted chiefly of the sheriff's testimony that Loucas offered bribes of $2,000 each to the prosecuting attorney and himself in exchange for the return of Pinciaro's slot machines which had been seized in the aforesaid raid. The tape recordings of three discussions involving the alleged bribery scheme were also introduced into evidence to corroborate the sheriff's story.

Counsel for Loucas argues that a recent decision of the Supreme Court of Appeals of West Virginia has held that the mere possession of slot machines is not per se illegal. State v. 25 Slot Machines, 256 S.E. 2d 595 (W. Va. 1979). Thus, the fact that Loucas, through alleged acts of bribery, may have aided and abetted Pinciaro in recovering and possessing slot machines does not establish an underlying violation of state law which would support a conviction under the Travel Act.

The government maintains that it need not prove an actual violation of a specific state

statute, but only an attempt to engage in activity which is illegal under state law. Thus, while Pinciaro may not have violated any West Virginia statute by merely possessing slot machines, there was allegedly overwhelming evidence that these gambling devices were acquired in furtherance of his illegal gambling operations.

The Travel Act is aimed primarily at organized crime and particularly at persons who reside in one state while operating or managing illegal activities located in another state. Rewis v. United States, 401 U.S. 808 (1971). The use of interstate commerce to violate or attempt to violate a state statute constitutes a federal crime, and the underlying state law merely serves a definitional purpose in characterizing the proscribed conduct. United States v. Prince, 515 F.2d 564, 566 (5th Cir. 1975); United States v. Conway, 507 F.2d 1047, 1051 (5th Cir. 1975); United States v. Polizzi, 500 F.2d 856, 869 (9th Cir. 1974); United States v. Goldfarb, 464 F. Supp. 565, 574 (E.D. Mich. 1979).

It is generally recognized that "the existence of a state law violation is an element of the violation of the Travel Act and that the court must make a determination of whether the underlying state law has been or could have been violated" United States v. Hiatt, 527 F.2d 1048, 1051 (9th Cir. 1976) (emphasis added) [citations omitted]. Thus, "accomplishment of the State substantive offense is not a prerequisite to a Section 1952 conviction." McIntosh v. United States, 385 F.2d 274, 277 (8th Cir. 1967) [citations omitted].[3/] Following this line of cases, our circuit has held that

> [t]he 'unlawful activity' specified in the [Travel] Act may be [an offense] under either state or federal law and reference to such law is necessary only to identify the type

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3/ In this regard, the McIntosh court adopted the reasoning in United States v. Azar, 243 F. Supp. 345 (E.D. Mich. 1964), that "[i]t is not required that the travel be in itself a criminal act, nor that the subsequent act be itself, unlawful, if it does in truth facilitate the carrying on [of unlawful activity]." Azar at 350. Accord, United States v. Teemer, 214 F. Supp. 952, 957 (N.D. W. Va. 1963).

> of 'unlawful activity' in which the defendants intended to engage. Proof that the unlawful objective was accomplished or that the referenced law has actually been violated is not a necessary element of the offense defined in section 1952.

United States v. Pomponio, 511 F2d 953, 957 (4th Cir. 1975), citing McIntosh v. United States, supra. In light of such authority, the contention by Loucas that he could be convicted only if Pinciaro's mere possession of slot machines were illegal is untenable. Since the government introduced a large amount of evidence concerning Pinciaro's intent to dominate the gambling activities in Hancock County, a rational trier of fact could believe beyond a reasonable doubt that Loucas' conduct in effectuating the return of the slot machines did aid and abet Pinciaro in promoting or attempting to promote various gambling activities. Thus, adequate evidence did exist to support Loucas' conviction.

Appellant's second issue involves the

refusal of the district judge to strike four jurors for cause because they had sat on an earlier panel which heard a gambling case. Loucas contends that when the defense moves to strike jurors for cause because they have sat on prior similar cases, the trial court must grant the motion. United States v. Stevens, 444 F.2d 630 (6th Cir. 1971). This departure from the normal requirement that actual bias be demonstrated before removing jurors for cause is founded on the "implied bias" theory of the dissent in Casias v. United States, 315 F.2d 614, 620 (10th Cir.), cert. denied, 374 U.S. 845 (1963):

> There is nothing new or novel in the concept of implied bias or disqualification based on consideration of policy. It is not uncommon for the law to say that one occupying a status or relationship which raises a suspicion of bias or prejudice shall not be called into the jury box, and if called, shall be excused for cause.

Counsel argues that the failure to strike the four jurors for cause was a substantial error which entitles Loucas to a new trial.

The government asserts that the compe-

tency of the jurors sitting in a particular case is a matter within the discretion of the trial court. Blevins v. United States, 12 F. 2d 548 (4th Cir. 1926). This approach is upheld by the generally accepted principle as set forth in Government of Virgin Islands v. Williams, 476 F.2d 771, 773 (3rd Cir. 1973), where the court stated that "[t]he federal courts have uniformly held that, absent some evidence of actual partiality, a juror is not disqualified merely because he previously sat in a similar case arising out of a separate and distinct set of circumstances even though the offenses charged in the cases are similar and some of the same prosecution witnesses testify in each case." [citations omitted]. This general rule has likewise been reiterated in more recent cases; e.g., United States v. Drake, 494 F.2d 648, 649 (7th Cir. 1974); United States v. Carranza, 583 F.2d 25, 28 (1st Cir. 1978). Applying this standard to the present record, we believe the trial court did not abuse its discretion in refusing to strike the jurors for cause.

Loucas' remaining contentions on appeal are that: the interstate travel involved was insufficient to sustain the conviction; testimony about the seizure of the slot machines was improperly admitted; the trial should have been continued due to adverse pretrial publicity; certain tape recordings and transcripts were improperly admitted into evidence; the jury verdicts were inconsistent; appellant was the victim of selective and discriminatory prosecution; and the government failed to rebut the defense of entrapment. A review of these allegations discloses that they are unmeritorious.

Upon consideration of all the issues raised on appeal by Loucas, we find no reversible error and affirm the judgment of the district court.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

DOCKET NO. 79-0004-E-02

UNITED STATES OF AMERICA VS.

Defendant:

EMMANUEL "MANNY" LOUCAS

JUDGMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date --- January 22, 1980.

COUNSEL

/___/ Without Counsel

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

/ XX/ With Counsel

James F. Companion & John R. Mitchell
(Name of Counsel)

PLEA

/___/ Guilty, and the court being satisfied that there is a factual basis for the plea,

/___/ Nolo Contendere,

/___/ Not Guilty

There being a verdict of : /__/ Not Guilty.

/XX/ Guilty.

FINDING & JUDGMENT

Defendant has been convicted as charged of the offense(s) of aiding and abetting travel in interstate commerce from the State of Ohio to the State of West Virginia with the intent to promote, manage, establish, carry on, facilitate the promotion, management, establishment and carrying on of an illegal gambling enterprise as charged in Court VI of the indictment, in violation of Title 18, United States Code, §§2 and 1952 (a)(3).

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that:

The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five years, the service of three of which years is hereby suspended. It was further

ORDERED that the defendant, after service of the sentence of imprisonment imposed, be placed on supervised probation for a period of five years, a special condition of which is that the defendant engage in a meaningful community service program to be supervised by the probation officer. It was further

SPECIAL CONDITIONS OF PROBATION

ORDERED that the defendant pay a fine in the amount of $5,000.00. It was further

ORDERED that the bond earlier posted be continued pending appeal.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set

out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends, that the period of imprisonment be served in a minimum security facility.

SIGNED BY: United States District Judge

ROBERT E. MAXWELL

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON THIS DATE 2/1/80, BY Helen L. Stemple, Deputy.

U.S. DISTRICT COURT
FILED AT ELKINS, W. VA.

FEBRUARY 1, 1980

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA

UNITED STATES

VS.

EMMANUEL "MANNY" LOUCAS,

Defendant.

CRIMINAL ACTION NO. 79-00004-E-02

O R D E R

For reasons appearing to the Court, and in accord with Rule 35(a), Fed. R. Civ. P., it is ORDERED that the Judgment and Sentence earlier imposed upon the above-named defendant be, and the same is hereby, amended so as to conform with the provisions of 18 U.S.C. 3651, to wit: that said defendant shall be confined in an appropriate institution for a period of six months.

It is further ORDERED that all other provisions, terms and conditions imposed upon the above-named defendant at the time

of sentencing are maintained and it is not intended that the same should be altered, modified or changed in any particular.

ENTER: February 13th, 1980.

/s/ Robert E. Maxwell
United States District Judge

U.S. DISTRICT COURT
FILED AT ELKINS, W. VA.

February 13, 1980

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office. Attest: Thomas F. Stafford, U. S. District Court Northern District of West Virginia

By /s/ Helen L. Stemple
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

September 26, 1980

TO: James F. Companion, Esq.

John R. Mitchell, Esq.

Stephen G. Jory, Esq.

William A. Kolibash, Esq.

NOTICE OF JUDGMENT

Judgment was entered in Case No. 80-5010 this date.

The Court's opinion is enclosed.

Petition for Rehearing (FRAP 40)

Filing Time — A petition may be filed within 14 days after judgment. No extensions will be granted save for the most compelling reasons. Requests based on grounds such as miscalculation of time or a need to consult with others will be peremptorily denied.

Purpose

A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.

2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.

3. An apparent conflict of another decision of the Court which is not addressed in the opinion.

The filing of a petition in order merely to reargue the case is an abuse of the privilege.

Statement of Counsel

A petition shall contain an introductory statement that, in counsel's judgment, one or more of the situations exists which is described in the "Purpose Section" discussed above. Thereafter, the points to be raised, succintly stated, shall then be listed in

the statement. Lacking such a statement, the petition will be returned to counsel without filing.

Form — The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however, a pro se party who is indigent may file the original only.

Bill of Costs(FRAP 39)

Filing Time — A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment.

Mandate (FRAP 41)

Issuance Time — The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

WILLIAM K. SLATE, II
CLERK

Enclosure
4CCA 28
Rev. 9/17/79

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-5010

United States of America,

Appellee,

versus

Emmanuel "Manny" Loucas,

Appellant.

O R D E R

Upon consideration of the appellant's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Hall with the concurrence of Judge Field and Judge Sprouse.

For the Court,

/s/ William K. Slate, II
Clerk

FILED
October 27, 1980
William K. Slate, II
Clerk

APPENDIX F

STATUTES INVOLVED

(1) 18 U.S.C. §2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

(2) 18 U.S.C. §1952. Interstate and Foreign Travel or Transportation In Aid Of Racketeering Enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to --

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State

in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury."

(3) W. Va. Code, §61-10-1. Keeping or Exhibiting Gaming Table, Machine, or Device; Penalty; Seizure of Table, Machine or Devise; Forfeiture of Money Used in Such Gaming.

Any person who shall keep or exhibit a gaming table, commonly called A. B. C. or E. O. table, or faro bank, or keno table, or any slot machine, multiple coin console machine, multiple coin console slot machine or device in the nature of a slot machine, or any other gaming table or device of like kind,

under any denomination, or which has no name, whether the game, table, bank, machine or device be played with cards, dice or otherwise, or shall be a partner, or concerned in interest, in keeping or exhibiting such table, bank, machine or gaming device of any character, shall be guilty of a misdemeanor, and, upon conviction, shall be confined in jail not less than two nor more than twelve months and be fined not less than one hundred nor more than one thousand dollars. Any such table, faro bank, machine or gaming device, and all money staked or exhibited to allure persons to bet at such table, or upon such gaming device, may be seized by order of a court, or under the warrant of a justice, and the money so seized shall be forfeited to the county and paid into the treasury of the county in

which such seizure is made, and the table, faro bank, machine or gaming device shall be completely destroyed: Provided, however, that the provisions of this section shall not extend to coin-operated nonpayout machines with free play feature or to automatic weighing, measuring, musical and vending machines which are so constructed as to give a certain uniform and fair return in value or services for each coin deposited therein and in which there is no element of chance.

APPENDIX G

INDICTMENT COUNT VI

On or about November 19, 1978, in the Northern Judicial District of West Virginia, Silvio "Birdie" Pinciaro, aided and abetted by Emmanuel "Manny" Loucas, did travel in interstate commerce from Jefferson County, State of Ohio, to New Cumberland, Hancock County, State of West Virginia, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, said unlawful activity being a business enterprise involving gambling, betting and wagering on sporting events and numbers and the use of illegal gaming devices in violation of Chapter 61, Article 10, Sections 1,5,11, and 11a of the West Virginia Code, and thereafter did perform and attempt to perform acts to promote, manage, and carry on and facilitate the promotion, management and carrying on of said unlawful activity in violation of Title 18, Section 1952(a)(3), and Title 18, Section 2, United States Code.

No. 80-1017

In the Supreme Court of the United States

OCTOBER TERM, 1980

EMMANUEL LOUCAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSTION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1017

EMMANUEL LOUCAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the government must prove that a defendant, charged with aiding and abetting a violation of the Travel Act, 18 U.S.C. 1952, had knowledge that the principal travelled in interstate commerce.

2. Whether the government must prove an actual violation of the predicate state statute in order to prove a violation of the Travel Act.

3. Whether the district court should have stricken for cause certain jurors at petitioner's trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 629 F. 2d 989.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18a) was entered on September 26, 1980. A petition for rehearing was denied on October 27, 1980 (Pet. App. 21a). The petition for a writ of certiorari was filed on December 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of West Virginia, petitioner was convicted of violating the Travel Act, 18 U.S.C. 1952, by aiding and abetting travel in interstate commerce with intent to promote an illegal gambling operation. He was initially sentenced to two years' imprisonment, five years' probation, and a $5,000 fine. The district court subsequently reduced the period of confinement to six months (Pet. 5; Pet. App. 16a-17a).

1. The evidence at trial showed that on June 30, 1978, the sheriff of Hancock County, West Virginia, conducted a warrant-authorized search of a place of business owned by petitioner's co-defendant, Silvio Pinciaro. That search resulted in the seizure of various pinball and slot machines (C.A. App. 46-48, 135-163).[1]

Petitioner, serving as Pinciaro's attorney, appeared at a magistrate's hearing on July 27, 1978, to seek return of the pinball and slot machines (C.A. App. 49-51). In the courthouse, according to Hancock County Sheriff Ronald Donell, petitioner offered the sheriff a bribe if the sheriff would return the machines. Specifically, petitioner told the

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[1] "C.A. App." refers to the joint appendix filed in the court of appeals.

sheriff that his client wanted to "buy back" the seized slot machines from the sheriff (C.A. App. 103-105, 164). Petitioner also told the sheriff that he wanted his cooperation in forcing another local pinball machine operator to give up his pinball machine locations so that Pinciaro could place his machines at those locations (C.A. App. 106-107, 211-212).

Petitioner met with Sheriff Donell on six subsequent occasions between July and November of 1978 to discuss the "buy-back" of the slot machines and the arrangements for placing Pinciaro's pinball machines in desirable locations. Donell, who was cooperating with federal authorities, made tape recordings of several of those meetings (C.A. App. 109-116, 119-121). Finally, at their meeting on November 16, 1978, petitioner paid Donell $2,000 for the return of Pinciaro's slot machines. Three days later, on November 19, 1978, Pinciaro arrived at the sheriff's evidence vault in Hancock County, West Virginia, to retrieve his slot machines (C.A. App. 128-129). Pinciaro's home during this period was in Steubenville, Ohio (C.A. App. 204-206).

2. At trial, petitioner admitted participating in the "buy-back" scheme and in the negotiations for the pinball machine locations. His defense was that he was entrapped by the sheriff and the local prosecuting attorney. The jury acquitted petitioner on one count of conspiracy but convicted him on one count of aiding and abetting Pinciaro in violating the Travel Act, 18 U.S.C. 1952. The count on which petitioner was convicted charged that on November 19, 1978, he aided Pinciaro in travelling from Ohio to West Virginia with intent to carry on a gambling business, in violation of West Virginia law (C.A. App. 14).

The court of appeals affirmed petitioner's conviction (Pet. App. 1a-11). It held that the evidence was sufficient to support the jury's verdict on the Travel Act count. In particular, the court found that the evidence was sufficient to

show that petitioner had aided and abetted Pinciaro, through acts of bribery in recovering his slot machines, which he intended to use to dominate gambling activities in Hancock County (Pet. App. 8a).

ARGUMENT

1. Petitioner first contends (Pet. 7-8) that the court of appeals applied an improper standard in finding that the evidence was sufficient to uphold his conviction. Although the court of appeals did not discuss this issue, petitioner reasons that the court must have applied the law of the circuit, which does not require proof that an aider and abettor had knowledge that the principal travelled in interstate commerce. See *United States* v. *Le Faivre*, 507 F. 2d 1288, 1297 (4th Cir. 1974), cert. denied, 420 U.S. 1004 (1975). Under the Sixth Circuit's rule, petitioner asserts, his conviction would have been set aside unless there was evidence showing that he was aware that Pinciaro travelled in interstate commerce. See *United States* v. *Prince*, 529 F. 2d 1108, 1112 (6th Cir.), cert. denied, 429 U.S. 838 (1976); *United States* v. *Alsobrook*, 620 F. 2d 139, 143-144 (6th Cir. 1980), cert. denied, No. 79-2061 (Oct. 6, 1980). Petitioner further contends that, applying the Sixth Circuit's standard, the reviewing court would necessarily have determined that the evidence was not sufficient to support the jury's verdict against him.[2]

As petitioner notes, there is a conflict among the circuits as to whether an aider and abettor of a Travel Act violation

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[2]In the district court, petitioner did not seek an instruction that would require the jury to find that he had knowledge of his co-defendant's interstate travel, and did not object to any instruction related to this issue that was given by the court. Moreover, petitioner did not challenge the district court's instruction on this issue in the court of appeals (see Brief for Appellant 11-12), and does not do so here. His claim in this Court is that, applying the proper legal standard, there was no evidence to support an inference that he was aware of his co-defendant's interstate travel.

must be aware that the principal has travelled or used interstate facilities. The Sixth Circuit requires proof of such knowledge. *United States* v. *Alsobrook, supra*; *United States* v. *Prince, supra*. Every other court of appeals that has addressed the issue has held that proof of such knowledge is not required. See *United States* v. *Barbieri*, 614 F. 2d 715 (10th Cir. 1980); *United States* v. *McPartlin*, 595 F. 2d 1321, 1361 (7th Cir.), cert. denied, 444 U.S. 833 (1979); *United States* v. *Perrin*, 580 F. 2d 730, 737 (5th Cir. 1978), aff'd on other grounds, 444 U.S. 37 (1979); *United States* v. *Sellaro*, 514 F. 2d 114, 120-121 (8th Cir. 1973), cert. denied, 421 U.S. 1013 (1975); *United States* v. *Le Faivre, supra* (4th Cir.); *United States* v. *Roselli*, 432 F. 2d 879, 891 (9th Cir. 1970). While this conflict may require resolution by this Court in the future, it is unnecessary to do so in this case because petitioner has not challenged the instructions under which the jury considered the case and because the evidence was sufficient to show that petitioner was aware that Pinciaro travelled in interstate commerce to promote a gambling operation. Since the evidence was sufficient on this issue, petitioner would not prevail in this case even if the minority rule of the Sixth Circuit had been applied by the court of appeals here.

The evidence at trial showed that Pinciaro lived in Steubenville, Ohio, and that his place of business (where the slot machines were seized) was in Weirton, West Virginia (C.A. App. 203-206). The Hancock County Sheriff's office also was located in West Virginia. Pinciaro's wife testified that he worked in West Virginia and left their home in Ohio each morning, crossing into West Virginia by one of the two bridges between Steubenville and Weirton (C.A. App. 204-205). He returned each evening after finishing his work in West Virginia (C.A. App. 205). The evidence further showed that petitioner was well aware of the nature of his client's business and worked with him in an illegal venture on a continuing basis. He stood in a position of trust with

respect to Pinciaro and negotiated repeatedly on his behalf with respect to the bribes and the placement of pinball machines. This evidence, viewed in its totality and in the light most favorable to the government, supports the inference that petitioner was aware that Pinciaro lived across the state line and would need to cross it to retrieve the evidence from the sheriff's vault. See *United States* v. *Barrow*, 363 F. 2d 62, 64-65 (3d Cir. 1966), cert. denied, 385 U.S. 1001 (1967). Accordingly, petitioner's conviction would have been upheld even under the Sixth Circuit's standard, and there is thus no need for this Court to review the judgment of the court of appeals in this case.

2. Petitioner next argues (Pet. 9-12) that the court of appeals erred by holding that the Travel Act can be violated without proof that there has been a completed violation of the predicate state statute. He asserts that, because mere possession of slot machines is not a violation of West Virginia law, the Travel Act could not have been violated since the government's proof did not show that Pinciaro had engaged in any gambling activities.

Petitioner takes an unduly narrow view of the Travel Act. The Act makes it unlawful for any person to travel in interstate commerce "with intent to * * * promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on" of one of a number of unlawful activities. 18 U.S.C. 1952(a)(3). In this case, the unlawful activity that petitioner and Pinciaro were charged with promoting or facilitating was a gambling operation, in violation of West Virginia law. The evidence at trial clearly showed that Pinciaro and petitioner engaged in a bribery scheme, and that Pinciaro travelled across state lines with the intent to promote a gambling operation.

Contrary to petitioner's contention (Pet. 11-12), the plain language of the Travel Act supports the construction

adopted by the court of appeals, not the contruction proposed by petitioner. The *corpus delicti* of the offense is interstate travel or use of interstate facilities. As applied to an offense such as the one in this case, the travel or use of interstate facilities must be done with intent to promote a business enterprise involving gambling in violation of state law, 18 U.S.C. 1952(a)(3), (b)(1). The plain language of the statute does not require that the state offense be completed—it requires only interstate activity joined with an intent to promote an enterprise involving a specified state offense. See *United States* v. *Pomponio*, 511 F. 2d 953, 957 (4th Cir.), cert. denied, 423 U.S. 874 (1975); *United States* v. *Peskin*, 527 F. 2d 71, 79 n.3 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976); *McIntosh* v. *United States*, 385 F. 2d 274, 276-277 (8th Cir. 1967); *United States* v. *Bergland*, 318 F. 2d 159, 161 (7th Cir.), cert. denied, 375 U.S. 861 (1963); *United States* v. *Azar*, 243 F. Supp. 345 (E.D. Mich. 1964); *United States* v. *Teemer*, 214 F. Supp. 952, 957-958 (N.D. W.Va. 1963).[3]

3. Petitioner finally argues (Pet. 12-15) that four jurors, who sat as jurors in an earlier gambling case stemming from the same overall investigation, should have been excused for cause. When they were not excused, petitioner used four of his peremptory challenges to remove them.

As the court of appeals stated, the decision whether to strike a juror for cause is a matter reposed within the discretion of the district court. Absent some indication of actual lack of impartiality, a juror is not disqualified merely because he or she previously served as a juror in a similar case, or a case involving some of the same witnesses. See

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[3]The statute also requires that, following the travel or use of interstate facilities, the defendant must engage in some act to promote or facilitate the promotion of the unlawful activity. That requirement was clearly satisfied in this case by Pinciaro's attempts to reclaim his slot machines from the custody of the sheriff.

Government of Virgin Islands v. *Williams*, 476 F. 2d 771, 773 (3d Cir. 1973); accord, *United States* v. *Carranza*, 583 F. 2d 25, 28 (1st Cir. 1978); *United States* v. *Drake*, 494 F. 2d 648, 649 (7th Cir. 1974).

In support of his claim, petitioner cites *United States* v. *Stevens*, 444 F. 2d 630 (6th Cir. 1971), and the dissenting opinion in *Casias* v. *United States*, 315 F. 2d 614 (10th Cir.) (en banc), cert. denied, 374 U.S. 845 (1963). Neither of those cases, however, offers him substantial aid. In *Stevens*, the court of appeals upheld the defendant's conviction even though the entire venire from which his jury had been selected had been present in the courtroom when a related case was tried and eight of the jurors in his case served on the jury in that related case. To be sure, the court observed that, as a general matter, "jurors should not be called to serve in cases involving witnesses or parties who participated in cases in which they were previously impanelled." 444 F. 2d at 632. However, the court determined that the jurors' prior exposure to the related case did not deprive the defendant of a fair trial. Likewise, in *Casias*, neither the prevailing nor the dissenting judges suggested that jurors who had participated in other similar cases are "ipso facto debarred from the jury box." 315 F. 2d at 621 (dissenting opinion). The question of prejudice is one to be determined during voir dire, and absent some proof of probable prejudice on the part of particular jurors, they should not automatically be stricken for cause.

In this case, the district court considered the relationship between petitioner's case and the earlier trial at which the four jurors had served (C.A. App. 74-75). The sheriff, who testified for the government in that case, testified for the

government in petitioner's case as well. And the two prosecutors who tried that case also tried petitioner's case.[4] Apart from those similarities, however, the cases were different in many respects: the statutory provisions were different (C.A. App. 73); the defendants were different; and the charges did not overlap (C.A. App. 74). The district court therefore concluded that any possible effect of prior exposure to government witnesses could be cured by appropriate instructions (C.A. App. 74-75). In light of the minimal risk of prejudice in this context, the district court correctly refused to strike the prospective jurors for cause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MARCH 1981

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[4]This is not an unusual situation. There are only four federal prosecutors in the Northern District of West Virginia. Only two of them work in the Wheeling, West Virginia office.

DOJ-1981-03

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1980

No. 80-1017

EMMANUEL LOUCAS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

On Petition For a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1980

No. 1017

EMMANUEL LOUCAS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

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PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARGUMENT

I.

Respondent's Brief Filed Out of Time and Cannot Be Considered

According to Rule 22.1 of the Supreme Court Rules, the respondent has 30 days in which to file a brief in opposition to a petition for writ of certiorari, unless the time is enlarged by the Court or a Justice

thereof or by the Clerk.

The petition for writ of certiorari in this case was docketed by the Clerk on December 19, 1980, and three copies of the petition were duly served by United States mail upon the respondent on that date. The time within which the respondent had to file his opposing brief expired on or about January 21, 1981, and the time for filing was not enlarged in any way set forth above.

Nevertheless, the respondent filed its brief some six weeks late, the same having been received by counsel for the petitioner on March 11, 1981. Rule 22.1 explicitly states, "The Clerk shall not accept a brief which does not comply with this Rule . . ." Attempting to file outside the 30-day limit is not complying with the Rule; therefore, this Court, which certainly expects private counsel and litigants to adhere to the Rules, must require the same, if not stricter, allegiance from the government's attorneys. As Rule 22.1 contemplates, this Court should direct the Clerk to reject the government's

brief and, of course, give no consideration to it.

II.

Response to Government's Statement (Brief 1-3)

Neither party in this case has deemed it essential to request certification of the record as provided in Rule 19.1 of the Supreme Court Rules; nevertheless, the respondent's statement cites quite liberally from portions of the record. In referring to the record, respondent, however, has overlooked the salient point that the bribery charge against Loucas was embodied only within the conspiracy count, the count under which he was acquitted. (C.A. App. 5-11).

The aiding and abetting count, upon which Loucas was convicted, alleges that four underlying statutes of the State of West Virginia were violated. (Pet. App. 27a). None of these statutes relate to bribery, and as previously argued by Loucas, the government failed to prove a violation of any one of those statutes. Nevertheless, the Fourth Circuit ruled that all the government had to prove was

that an underlying State statute "could have been violated." (Pet. App. 7a).

The suggestion that recovery of Pinciaro's slot machines was done for the purpose of enabling him to dominate illegal gambling activities in Hancock County, West Virginia, is simply not supported by the record. Throughout the entire period of time alleged in the indictment, that is, from June, 1976, through November 19, 1978, Pinciaro was interested in acquiring locations for his pinball machines and not his slot machines. (C.A. App. 106-107, 112-113, 119C-119D, 119J, 126-127, 136, 216-218).[1] What Pinciaro untimately was going to do with the slot machines is not ascertainable from the record in this case. All that can be determined about those machines is that they were in storage when the sheriff first saw them

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[1]At page two of its brief filed in the Fourth Circuit, the government said, "The government believes that defendant Loucas has fairly set forth the facts in his brief and will not repeat a Statement of Facts . . . "

in November, 1977, and they were placed back in storage on November 19, 1978, when Pinciaro retrieved them from the sheriff. To suggest that Pinciaro's retrieval of his slot machines was an attempt to violate the West Virginia gaming device statute on the kind of historical record in this case is pure speculation not supported by any factual foundation.

III.

Response to Government's Argument (Brief 3-8)

A. Conflict Among Circuits On Knowledge Required by Aider and Abetter For Conviction Under Travel Act, 18. U.S.C. §1952(a)(3)

The government attacks the petitioner's argument on two grounds, neither of which is tenable. First, the petitioner's failure to offer an instruction on the knowledge requirement does not eliminate the requirement or absolve the government from offering proof of the essential elements of a crime. Furthermore, such an instruction, in light of the present law in the Fourth Circuit, would not have been given any way.

Secondly, and again citing liberally but not accurately from a record which is not before this Court, the government argues that the evidence was sufficient to show that Loucas knew that Pinciaro travelled in interstate commerce on the day he retrieved his slot machines. In the first place, the government made no conscious or determined effort to prove the knowledge aspect. Also, much emphasis is placed on the position of trust which Loucas and Pinciaro allegedly shared by virtue of their attorney-client relationship. However, this does not lead to the inference that Loucas knew where Pinciaro resided or that he travelled in interstate commerce on the day the slot machines were retrieved.[2]

B. Proof of Underlying State Statute for Conviction Under Travel Act

In addition to the points raised under

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[2] One point overlooked by the government in referring to the record is that Loucas' law office and Pinciaro's place of business were located on the same street in Weirton, West Virginia, within eyesight of each other. (C.A. App. 46, 50). Thus, Loucas would not need to know Pinciaro's home address in order to make contact with him.

Item II of this reply brief, the petitioner again points out that the alleged bribery scheme was not a part of the aiding and abetting count. The bribery charge, West Virginia Code, §61-5A-3, was only included in the conspiracy count which resulted in an acquittal.

Furthermore, the government's brief fails to speak to the virtual "rewriting" of the Travel Act by the insertion of the words "could have." Applying those words to the Loucas case, the Fourth Circuit actually held that Loucas is guilty because his principal, Pinciaro, could have used the slot machines in violation of West Virginia law. Just as consistent, however, is the inference that Pinciaro could have used those machines without violating West Virginia law.[3]

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[3] As stated in State v. 25 Slot Machines, 256 S.E. 2d 595, 598 (W. Va. 1979), "Gambling devices under Code, 61-10-1 are not per se illegal."

C. Implied Bias Sufficient Reason to Strike Jurors For Cause

Contrary to the government's assertion, the case of United States v. Stevens, 444 F. 2d 630 (6th Cir. 1971), gives stronger support to the implied bias theory than the government is willing to concede. In Stevens, the defendant failed to object to the array before the jury was impaneled, and that failure had considerable influence in leading the court to affirm the conviction. In the instant case, counsel for Loucas did move to strike the four jurors for cause. (C.A. App. 72-76).

In a footnote, the government is apparently attempting to justify the use of the same two prosecutors because only two federal prosecutors work in Wheeling, West Virginia. That argument has no credibility. In the Northern District of West Virginia, the four federal prosecutors try cases in all six points of holding court within the district. Furthermore, the Department of Justice commonly dispatches attorneys to try special cases and, frequently, Assistant

United States Attorneys from other districts are detailed to help out in districts which are understaffed or need assistance for any of a variety of reasons.

Conclusion

For the foregoing reasons, the petitioner respectfully requests this Court to disregard the government's untimely-filed brief and to issue a writ of certiorari to review the judgment and opinion of the Fourth Circuit.

RESPECTFULLY SUBMITTED,

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